

**Jerome Russo Quality Painting and Decorating, Inc.  
and International Brotherhood of Painters &  
Allied Trades of the United States and Canada,  
AFL-CIO, Local 452**

**Waite Painting Corporation and International  
Brotherhood of Painters & Allied Trades of the  
United States and Canada, AFL-CIO, Local  
452.** Cases 12-CA-14663, 12-CA-14664, 12-  
CA-14681, and 12-CA-14682

December 16, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On July 29, 1992, Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt the recommended Order as modified.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Jerome Russo Quality Painting and Decorating, Inc. and Waite Painting Corporation, Lake Worth, Florida, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph A, 1 (f1MDBUf1\*ERR17\*f1MDNMf1g)f1MDBUf1\*ERR17\*f1MDNMf1d) after the subsequent paragraphs.

“(f1MDBUf1\*ERR17\*f1MDNMf1g)f1MDBUf1\*ERR17\*f1MDNMf1d) fully requiring prospective employees of our employees or deal directly with our employees about matters falling within the scope of collective bargaining.”

2. Substitute the following for paragraph A, 2 (f1MDBUf1\*ERR17\*f1MDNMf1c)f1MDBUf1\*ERR17\*f1MDNMf1d).

<sup>1</sup> The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (f1MDBUf1\*ERR17\*f1MDNMf1d) 3d Cir. 1951) (f1MDBUf1\*ERR17\*f1MDNMf1d) find no basis for reversing the findings.

We do not adopt the judge's finding regarding Respondent Russo's alleged refusal to hire Carl Monahan since the complaint did not allege that that conduct was a violation of the Act and the issue was not litigated at the hearing. The judge found that the Respondent violated Sec. 8 (f1MDBUf1\*ERR17\*f1MDNMf1a)f1MDBUf1\*ERR17\*f1MDNMf1d) tantamount to “yellow dog” contracts. He, however, inadvertently failed to include any provisions in the notice and Order with respect to this finding. We have made the appropriate modifications to the Order.

“(f1MDBUf1\*ERR17\*f1MDNMf1c)f1MDBUf1\*ERR17\*f1MDNMf1d) statement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.”

3. Insert the following as paragraph A, 2 (f1MDBUf1\*ERR17\*f1MDNMf1d)f1MDBUf1\*ERR17\*f1MDNMf1d) after the subsequent paragraphs.

“(f1MDBUf1\*ERR17\*f1MDNMf1d)f1MDBUf1\*ERR17\*f1MDNMf1d) lawful documents signed by prospective employees stating that they are no longer an active member in Local 452 and/or that they are not an active member of any union.”

4. Substitute the attached notice for the administrative law judge's Appendix A.

**APPENDIX A**

**NOTICE TO EMPLOYEES**

POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to execute the collective-bargaining agreement agreed to by us and the International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO, Local 452.

WE WILL NOT change the terms and conditions of employment set forth in the agreement during the term of the agreement.

WE WILL NOT unilaterally and without notice to the Union fully requiring prospective employees of our employees or deal directly with our employees about matters falling within the scope of collective bargaining.

WE WILL NOT unlawfully withdraw recognition and refuse to bargain with the Union during the period that the aforesaid collective-bargaining agreement is binding on the parties.

WE WILL NOT unlawfully discharge or discipline any of our employees or discriminate against them in any manner because of their union affection or union activities.

WE WILL NOT unlawfully require prospective employees to sign documents stating that they are no longer active members of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL forthwith sign the collective-bargaining agreement referred to above and recognize and bargain collectively with the Union during the term of the contract.

WE WILL give retroactive effect to the provisions of the agreement and make whole our employees for any losses they may have suffered by reason of our failure to sign the agreement.

WE WILL continue in effect any and all benefits of every kind or nature that we have given our employees since August 31, 1991.

WE WILL offer Antoine Poma and John Babcock immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

WE WILL remove from our files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL rescind and remove from our records the unlawful documents signed by prospective employees stating that they are no longer members of Local 452 and/or that they are not active members of any union.

WE WILL make whole our unit employees by transmitting the contributions owed to the Union's health and welfare, pension, vacation and holiday, and apprenticeship and training funds pursuant to the terms of our collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any other expenses ensuing from our unlawful failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare, pension, industry, and apprenticeship funds after we unlawfully discontinued contributions to those funds; for any premiums they may have paid to third party insurance companies to continue medical and dental coverage in the absence of our required contributions to such funds; and for any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered.

JEROME RUSSO QUALITY PAINTING AND  
DECORATING, INC.

*Shelley Plass, Esq.* and *Hector Nava, Esq.*, for the General Counsel.

*Charles S. Caulkins, Esq.* and *Kenneth A. Knox, Esq.*, of Fort Lauderdale, Florida, for the Respondents.

*Matthew J. Mierzwa, Esq.*, of West Palm Beach, Florida, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The Charging Party is the International Brotherhood of Painters & Allied Trades of the United States and Canada, AFL-CIO, Local 452 (fiMDBUfi\*ERR17\*fiMDNMfi the Union) fiMDBUfi\*ERR17\*fiMDNMfi Jerome Russo Quality Painting and Decorating, Inc. (fiMDBUfi\*ERR17\*fiMDNMfi ent Russo) fiMDBUfi\*ERR17\*fiMDNMfi, and Waite Painting Corporation (Waite) fiMDBUfi\*ERR17\*fiMDNMfi.

The original charge in Case 12-CA-14663 was filed by the Union on September 9, 1991, and a copy was served by certified mail on Respondent Russo on the same date.

The first amended charge in Case 12-CA-14633 was filed by the Union on September 30, 1991, and a copy thereof was served by certified mail on Respondent Russo on that same date.

The second amended charge in Case 12-CA-14663 was filed by the Union on November 27, 1991, and a copy was served by certified mail on Respondent Russo on the same date.

The original charge in Case 12-CA-14664 was filed by the Union on September 9, 1991, and a copy was served by certified mail on Respondent Waite on the same date.

The first amended charge in Case 12-CA-14664 was filed by the Union on September 30, 1991, and a copy was served by certified mail on Respondent Waite on that same date.

The original charge in Case 12-CA-14681 was filed on September 1, 1991, and a copy was served by certified mail on Respondent Russo on the same date.

The first amended charge in Case 12-CA-14681 was filed by the Union on November 29, 1991, and a copy was served by certified mail on Respondent Russo on that same date.

The original charge in Case 12-CA-14682 was filed by the Union on September 18, 1991, and a copy was served by certified mail on Respondent Waite on the same date.

The first amended charge in Case 12-CA-14682 was filed by the Union on November 29, 1991, and a copy was served by certified mail on Respondent Waite on that same date.

An order consolidating cases, consolidated complaint and notice of hearing was issued November 29, 1991. Among other things it is alleged in the complaint that the Respondents have failed and refused to execute a written contract with the Union; that Respondent Russo discharged its employees Antoine Poma and John Babcock; that Respondent Waite withdrew benefits from its employees George James and Segundo Luciano; and that Respondent Russo said to its employees that they would be terminated because of their affiliation with the Union and also required prospective employees to enter individual contracts as a condition of employment in which they would terminate their membership in the Union or any other labor organization, all in violation of Section 8 (fiMDBUfi\*ERR17\*fiMDNMfi a) fiMDBUfi\*ERR17\*fiMDNMfi (fiMDBUfi\*ERR17\*fiMDNMfi the Act) fiMDBUfi\*ERR17\*fiMDNMfi.

Respondents filed timely answers denying that they had engaged in the unfair labor practices alleged.

The matter came on for hearing in Fort Lauderdale, Florida, on March 23, 24, 25, and 26, 1992.

Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and con-

clusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

#### FINDINGS OF FACT,<sup>1</sup> CONCLUSIONS, AND REASONS THEREFOR

##### I. THE BUSINESS OF THE RESPONDENT

At all times material, Respondent Russo, a corporation with an office and place of business in Lake Worth, Florida (fMDBUf\*ERR17\*fMDNMf Respondent Russo's facility) fMDBUf\*ERR17\*fMDNMf has been engaged in providing painting, decorating, and related services.

At all times material, Respondent Waite, a corporation with an office and place of business in Lake Worth, Florida (fMDBUf\*ERR17\*fMDNMf Respondent Waite's facility) fMDBUf\*ERR17\*fMDNMf has been engaged in providing painting, decorating, and related services.

Annually, Respondent Russo, in the course and conduct of its business operations described above, purchased and received at its Lake Worth, Florida facility goods and materials valued in excess of \$50,000 from other enterprises located within the State of Florida, each of which other enterprises had received these goods and materials directly from points outside the State of Florida.

Annually, Respondent Waite, in the course and conduct of its business operations described above, purchased and received at its Lake Worth, Florida facility goods and materials valued in excess of \$50,000 from other enterprises located within the State of Florida, each of which other enterprises had received these goods and materials directly from points outside the State of Florida.

Respondents are now, and have been at all times material, employers engaged in commerce within the meaning of Section 2(fMDBUf\*ERR17\*fMDNMf2)fMDBUf\*ERR17\*fMDNMf

##### II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(fMDBUf\*ERR17\*fMDNMf5)fMDBUf\*ERR17\*fMDNMf of the Act.

##### III. THE UNFAIR LABOR PRACTICES

First: Respondent Russo has not denied that about September 1985, Respondent Russo, an employer engaged in the construction industry, as described above, granted recognition to the Union as the exclusive collective-bargaining representative of the unit<sup>2</sup> by entering into a collective-bargaining

<sup>1</sup> The facts found herein are based on the record as a whole and the observation of the witnesses. The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (fMDBUf\*ERR17\*fMDNMf1962)fMDBUf\*ERR17\*fMDNMf of the findings, their testimonies have been discredited either as having been in conflict with the testimonies of credible witnesses or because the testimony was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

<sup>2</sup> Par. 7(fMDBUf\*ERR17\*fMDNMf1a)fMDBUf\*ERR17\*fMDNMf of the consolidated Respondent Russo herein called Russo's Unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(fMDBUf\*ERR17\*fMDNMf1b)fMDBUf\*ERR17\*fMDNMf of the Act.

agreement with the Union for the period September 1, 1985, to August 31, 1986, without regard to whether the majority status of the Union had ever been established under the provisions of Section 9 of the Act.

Respondent Waite has not denied that about September 1986, Respondent Waite, an employer engaged in the construction industry, as described above, granted recognition to the Union as the exclusive collective-bargaining representative of the unit<sup>3</sup> by entering into a collective-bargaining agreement with the Union for the period September 1, 1986, to August 31, 1987, without regard to whether the majority status of the Union had ever been established under the provisions of Section 9 of the Act.

Russo and Waite were signatories of separate identical contracts which expired August 31, 1991.

The ERRA and MDNMf has been engaged by and for the Contractors' Negotiating Committee which was a loose organization in the construction industry of employers who were engaged in business similar to the business of Respondent Russo and Respondent Waite. For the negotiation of the 1990 contract this group chose as negotiators three persons, two of whom were Jerome Russo, president of the Respondent Russo, and Joy Waite, agent of Respondent Waite. (fMDBUf\*ERR17\*fMDNMf) These persons are referred to as the negotiating committee and representatives of the Union.<sup>4</sup>

All members of the Contractors' Negotiating Committee signed the agreement. Both Respondents Waite and Russo signed the agreement as they had been doing for several years.<sup>5</sup>

In 1991 signatory contractors met in March and again chose by election Jerome Russo and Joy Waite to be on the negotiating committee of three. The third member was Walter Brandon from Brandon & Maehlmann Painting Corp. (fMDBUf\*ERR17\*fMDNMf) which has since ceased business. The same contractors who signed the 1990 agreement participated in the 1991 negotiation through the committee they had chosen.<sup>6</sup>

All employees of Respondent Russo who perform work which is described in and covered by the Working Agreement effective September 1, 1991 through August 31, 1992 between the Union and any person, firm or corporation performing work under the trade and geographical jurisdiction as set forth in this Working Agreement.

<sup>3</sup> Par. 7(fMDBUf\*ERR17\*fMDNMf1b)fMDBUf\*ERR17\*fMDNMf of the consolidated Respondent Waite herein called Waite's Unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(fMDBUf\*ERR17\*fMDNMf1b)fMDBUf\*ERR17\*fMDNMf of the Act.

The following employees of Respondent Waite, herein called Waite's Unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(fMDBUf\*ERR17\*fMDNMf1b)fMDBUf\*ERR17\*fMDNMf of the Act:

All employees of Respondent Waite who perform work which is described in and covered by the Working Agreement effective September 1, 1991 through August 31, 1992 between the Union and any person, firm or corporation performing work under the trade and geographical jurisdiction as set forth in this Working Agreement.

<sup>4</sup> In 1990 according to Jerome Russo the negotiating committee's final offer was to extend the contract another year with a wage freeze. This was accepted by the Union.

<sup>5</sup> The parties stipulated that Respondent Russo's collective-bargaining relationship with the Union went back "approximately 15 years" and Respondent Waite's collective-bargaining relationship with the Union went back "about 22 years."

<sup>6</sup> Jerome Russo named Maehlmann's Brockway, Brandon & Maehlmann's Brockway, Russo Painting, and Waite Painting as signatory contractors.

Continued

These three persons were to act as the contractors' spokespersons and negotiators. On April 8, 1991, Respondent Russo addressed a letter to the Union including this sentence "It is the intention of this correspondence to terminate the agreement effective August 31, 1991 unless modifications satisfactory to the undersigned are made to such agreement."

The same letter was received by the Union from Respondent Waite, Neil's Decorating, Brandon & Moreno Painting Corp., Chas G. Brockway & Sons, Inc., and Maehlmann's, Inc.

Respondent Russo also addressed the following letter to the Union on April 8, 1991.

Painters & Allied Trades  
Local Union 452  
1218 Omar Road  
West Palm Beach, Florida 33405  
Local 452  
Re: Negotiations  
Dear Labor Negotiations Committee,

Jerome Russo Quality Painting and Decorating Inc. is notifying you that Russo Quality Painting and Decorating, Inc. will not negotiate on a one to one basis, Russo Painting will only negotiate through the elected contractors negotiating committee. The committee will consist of Walt Brandon, Jerry Russo, and Joy Waite. The four alternates will be Robert Brockway, Harold Clark, Neil Rasmussen and John Waite.

The Union received identical letters from Waite Painting Corp., Neil's Decorating, and Brandon & Moreno Painting Corp. The first negotiating meeting occurred June 13, 1991. Written minutes, which were later typed, were taken at the meeting. The minutes were "read out loud."

Both parties approved the minutes. The minutes reveal that the meeting was 10 minutes long. "Labor offered management \$1.00 a hour over a two year period and put in pocket, no increase in benefits. . . . Management would take the offer back to the contractors for an answer." Jerome Russo was the spokesperson for the contractors. No written proposals had been prepared by management, however, Jerome Russo advised the Union that the negotiating committee would return with a counterproposal. According to Jerome Russo, he went to management with the Union's proposal. Management rejected the proposal. Some of the contractors said they would entertain the idea of a wage freeze. Jerome Russo also told management that he had represented to the Union that he would come back with a counterproposal. According to Russo the response was "we could not generate a penny . . . no increase in wages." However, no written proposals were prepared.

The second negotiating meeting as convened on July 11, 1991. Written minutes were again taken and reduced to typed form. Jerome Russo prepared the notes. The typed minutes reveal among other things:

[I]t was a 100% decision by management, a penny could not be generated, and the answer to labor's request was no. . . . that we are lucky we have work to

present at the contractors' meeting. Absent were Miller, General Caulking, and Griffin.

bid and labor has jobs to go to on daily basis, and that an even keel is being maintained so far. "Labor would take offer back to members for a vote." (fiMDBUfi\*ERR17\*fiMDNMfi version is "Labor take proposal back to membership.")fiMDBUfi\*ERR17

Jeff McGinley, recording secretary, who attended the negotiating session testified that among other things Jerome Russo said, "in order to survive we had to keep things as they were to maintain an even keel. . . . [T]hat they could not afford to pay a penny for a raise." At this point McGinley called a caucus of the union representatives in order to consider the Contractors' proposal. McGinley recommended to the other conferees that they "go along with the contractors and keep things as they were for a year because of the economic conditions and to just work together because nobody can afford to be out of work at this time." Further testifying McGinley said:

We came back and we discussed it with management that we understand how they felt and I wanted to make it very clear that we were going to go take their proposal back to the membership for a vote so that we can continue working and get the agreement signed.

And they agreed. They said that that would be good and that to take the proposal back, to just freeze the contract for another year.<sup>7</sup>

Whereupon McGinley said he would notify the membership and "take it for a ratification vote."

According to McGinley, after the meeting he had a conversation in the parking lot with the management representatives. They told him they were "happy with the way things went" and Jerome Russo said, "you have to sell this to the members."

Tim D. Maitland, business representative of the Union, also testified about the events of the July 11 meeting. His testimony corroborated the testimony of McGinley.

Of the July 11 meeting Joy Waite recorded in her affidavit, "towards the end of the meeting of the Union said they would go back to the membership to see if they could get another wage freeze like had been done last year. Joy Waite testified, "We told Mr. McGinley to go find out what the membership has to say [about freezing wages for another year] and come back and let us know."<sup>8</sup> She testified that nothing was said from which the Union could draw the inference that management was making an offer of a wage freeze.<sup>9</sup>

Joy Waite testified that a subsequent date for a negotiation meeting was not scheduled because she was leaving on vacation as was Jerome Russo.

Jerome Russo testified that at the July 11 negotiation meeting he took the minutes, read them to conferees, and they were approved. Jerome Russo also prepared the typed

<sup>7</sup> McGinley also testified, "I asked them if they were proposing that we freeze the contract for another year and they said yes." All three of the committee answered, "yes."

<sup>8</sup> Jay Waite also testified:

Mr. McGinley said to everybody there, both sides, can we take back a wage freeze to the membership to see how they feel. . . . We said, go ahead and take it back to membership and see what they have to say.

<sup>9</sup> Joy Waite's testimony on this point is not credited.

minutes which were distributed to the conferees. No objections were lodged against the typed minutes.

According to Jerome Russo the July 11 meeting commenced with his advising the union representatives that management "could not generate a penny for any wage increases." In regard to the subject of a wage freeze Jerome Russo testified:

If I remember correctly, Jeff mentioned, or brought up the subject that he would like to take back to Labor, or go back to Labor, or if I remember correctly, and sell . . . see if he could sell freezing wages. . . . If I remember correctly, Management of course was on the other side of table. We all looked at one another, and I believe I replied that, Why don't you try to do that.

Jerome Russo testified that he remembered "complementing Jeff [McGinley] on making the suggestion of taking back to labor, to try to sell the wage freeze."

During the July 11 negotiations the contractors' negotiating committee asked for no modifications to the contract.

On August 6, 1991, the Union held a ratification meeting pursuant scheduling a "Special called meeting" for August 6, 1991, at 8 p.m. "to vote on contractors' proposal."

At the special meeting, the membership approved the contractors' proposal for an agreement.<sup>10</sup> According to Maitland, "The ratification was on the contractors' proposal of rolling over the agreement for another year, the same wages and working conditions."

On August 7, 1991, Maitland sent the following letter to Jerome Russo:

Management Negotiating Committee  
Jerome Russo, Chairman  
Jerome Russo Quality Painting & Decorating  
3551 23rd Avenue South Suite 6  
Lake Worth, FL 33461

Dear Jerry:

On August 6, 1991, the Labor Negotiations Committee took Management's last offer back to the membership. The proposal to freeze the wages and benefits for a one year contract was accepted by vote.

We are looking forward to meeting with you to sign the Agreement.

Maitland testified: "I talked to Jerry on the phone and told Jerry that the membership had voted to accept the proposal. And Jerry said that he thought that that was good, and he was awful busy, but he would try to get together and sign the agreement. We would try to make a date."<sup>11</sup> In the meantime the Union ordered the printing of the contract for the contractors' signatures.

<sup>10</sup> McGinley told the members at the meeting, "And at that meeting I got up and I told the members of the contractors' position and that their proposal was to freeze the contract for another year because they could not afford any raises of any sorts, in the fringe benefits or the wages and that their proposal was to freeze the contract for another year."

<sup>11</sup> Jerome Russo denied that he had received the letter or engaged in the telephone conversation with Maitland. His denial is not credited.

According to Joy Waite a couple of weeks after the July 11 meeting in early August she called Jerome Russo and asked him whether he had heard anything from the Union. His answer was negative. He said he would call the Union. The next day Jerome Russo called Waite and informed her that he had spoken to McGinley who advised him "they have a contract." Waite responded, "there's no way we have a contract." Jerome Russo testified that he had received a call from Joy Waite. Jerome Russo phoned McGinley, the date of which he placed in the "first or second week of August."<sup>12</sup> McGinley informed Jerome Russo "that we weren't going to negotiate and that the minutes said we had an agreement." Jerome Russo replied, "it was B.S."<sup>13</sup>

Thereupon Jerome Russo called all the contractors and told them of his conversation with McGinley and that in his opinion a contract had not been negotiated. None of the contractors told Jerome Russo that they would not sign the contract.

On August 8, 1991, Maitland visited one of Respondent Russo's jobsites where he observed nonunion members working. The next day, August 9, 1991, he called Jerome Russo to inquire about the situation. Among other things Maitland said, "I had called the other day and we were going to set up a date to sign the agreements, when we can get together and do this." Jerome Russo answered that "there is a problem" and that "it is too big to discuss over the phone." A luncheon meeting was scheduled for August 16, 1991.<sup>14</sup>

On August 16, 1991, Jerome Russo, McGinley, and Maitland met at Barbecue Ben's for lunch. According to McGinley Jerome Russo stated that he "felt that he could not afford to pay fringe benefits on all of his employees and still survive in the business that he's in" and that he felt that "the management committee did not give a proposal to us at the time." McGinley produced the minutes in which the contractors' proposal was recorded and said that the Union had accepted the proposal. Jerome Russo stated that he was not sure whether he would sign the contract but would let the Union know on August 26, 1991.

Maitland also remembered that Jerome Russo had said that "the contractor committee did not make a proposal to us" and that McGinley showed Jerome Russo the minutes in his own handwriting.

Jerome Russo agreed that he was asked to sign the agreement. His response, "I would give this great importance over the vacation, and when I got back, I would have a definite answer for them, as to whether I would sign the agreement, or not."<sup>15</sup>

On August 26, 1991, a meeting occurred at the union hall at which McGinley, Maitland, Jerome Russo, Walter Brandon, John and Joy Waite, and Neil Rasmussen were

<sup>12</sup> This date must have been after August 6, 1991, since the Union's ratification meeting was on August 6.

<sup>13</sup> Jerome Russo's recollection of this conversation seems quite vague.

<sup>14</sup> Jerome Russo agreed that Maitland had phoned him about some of his workers and asked him whether he was going to sign the contract.

<sup>15</sup> Jerome Russo testified that at this time he had already decided not to sign the agreement.

present.<sup>16</sup> Jerome Russo insisted that no proposal had been made. His minutes were shown him and the contractors present were asked to sign the agreement. Respondents refused. Jerome Russo insisted that he would not pay its fringe benefits. Rasmussen stated that as long as the Union was freezing the contract for another year he would sign and left.

According to Joy Waite the three employers said that if they did not get modifications they would terminate.

According to Russo the conferees were told that the Union's attorney had reviewed the matter and opined that the contract was "binding."

On August 30, 1991, John and Jo Waite, Jerome Russo, and Brandon sited McGinley at the union hall and met with McGinley. They indicated that they felt they did not have an agreement and they had letters which they wanted McGinley to sign recognizing that they were "terminating any and all affiliation with the local in respect to the signed agreements." McGinley responded that there was an agreement. Their reply was "in order to have the union members work they were going to have to sign papers dropping out of the Local Union and not being affiliated with it." Respondent Waite and Russo left the letters which set a termination of the contract as of August 31, 1991.

Respondent Russo decided to go nonunion as of August 31, 1991, of which event prior to August 31, 1991, he advised his employees at the jobsite and that the Company would no longer make contributions to the fringe benefit funds.

Respondent Waite decided immediately after the August 26, 1991 meeting to go nonunion. This decision was related to Respondent Waite's employees at the jobsites. Employees were also told there would be no contributions to the fringe benefits after August 31, 1991. On August 30, Respondent Waite's employees were told that if they had any questions they should go to the Union for answers. Joy Waite testified that its employees were told the "differences with the Union was not over money and whatever we paid in the Union . . . we would pay to them." At the time Respondent Waite employed three union members. Each of the contractors who were not present during either the June 13 or July 11 negotiating sessions has signed the collective-bargaining agreement with the Union. Brandon & Moreno have ceased business.

Second: The fact that the contractors who authorized collective bargaining through the elected contractors' negotiating committee (fMDBUfl\*ERR17\*fMDNMfl except Russo and Waite) signed the agreement creates a strong inference that, when Jerome Russo met with the contractors to deliver the Union's offer and receive a counteroffer, they authorized him to counteroffer a rollover of the contract. This inference is strengthened by the fact that not one contractor (fMDBUfl\*ERR17\*fMDNMfl not even Brandon) gainsay this inference. This inference is further strengthened by the minutes of July 11, 1991, "Labor would take offer back to members for a vote."<sup>17</sup> Moreover, after the July 17, 1991

negotiating meeting the Union conducted itself as if it had been tendered a bona fide offer of a rollover of the contract. It held a membership ratification meeting pursuant to post-card notices and the extension of the rollover agreement was approved by the union membership after which the contract was printed. If the Respondent's position is well taken that no offer was made, then the Union must have been fooled. It is not reasonable to conclude that it was the intent of the contractors' negotiating committee to mislead or bilk the Union. The Union's course of conduct was wholly incompatible with the Respondents' insistence that an offer was not given. Nor do I find that the Union's action was devious or the result of a misunderstanding.<sup>18</sup>

All credible factors indicate that the intent of the parties was to wrap up a rollover contract as had been done in the past. All the conferees knew the procedures.

I credit the General Counsel's version of the July 11, 1991 negotiating meeting which is verified by the minutes of the meeting. McGinley and Maitland were credible witnesses. The testimony of Jerome Russo and Joy Waite was tailored.

I find that the credible record supports the finding that the contractors negotiating committee made a rollover contract proposal of the 1991 contract and that the proposal was accepted by the Union prior to any attempt by Waite and Russo to repudiate it. As were the other contractors, Joy Waite and Jerome Russo were bound by the acceptance of the offer which they made to the Union at the July 11, 1991 negotiating meeting. They, as did the other contractors, agreed that they would "not negotiate on a one to one basis" but "on through the elected contractors negotiating committee."

I find that the Respondents' refusal to execute the agreement violated Section 8(fMDBUfl\*ERR17\*fMDNMfla)fMDBUfl\*ERR17\*fMDNMfl Respondent's failure to continue in full force and effect all terms and conditions of the 1991-1992 working agreement was in violation of Section 8(fMDBUfl\*ERR17\*fMDNMfla)fMDBUfl\*ERR17\*fMDNMfl

#### The Carl S. Monyhan Incident

First: Carl S. Monyhan was a journeyman painter and a member of the Union. On September 8, 1991, Monyhan and Angel Rodriguez applied for work with the Respondent Russo. Jerome Russo indicated that he could use a "couple of guys" but before he would put them to work they would have to sign "some papers."

These are the "some papers":

September 9, 1991

CHUM\*ERR17\*fMDNMfl was called to gainsay  
514 Jackson Avenue  
Greenacres, Florida 33463

This letter is to state that the above mention[ed] employee as of August 31, 1991 is no longer an active

<sup>16</sup> McGinley invited Rasmussen to attend because he had told McGinley that he would sign the contract "so long as we froze the contract for another year."

<sup>17</sup> This inference is further supported by the fact that, according to Jerome Russo when he learned that the contract had been accepted, and thereafter contacted the other contractors to inform them of the acceptance, the evidence is that not one was reported by Jerome Russo to have disavowed the contract.

<sup>18</sup> Although it seems clear from the credible record that initially Jerome Russo and Joy Waite were agreeable to the offer, it may have been that Jerome Russo did not make the offer for himself in good faith; that anticipated that the Union would reject the offer. This, of course, would have left Jerome Russo free to follow another tack.

member in Local Union 452, nor an active member of any union, painters local.

Jr/mcl

/s/ Carl L. Monyhan  
Carl Monyhan

/s/ Jerome Russo  
Jerome Russo

Sandra A. Russo (fiMDBUfi\*ERR17\*fiMDNMfi) 4880.  
9-9-91

September 9, 1991

Carl Monyhan

Russo Painting & Dec., Inc. is no longer responsible for payment of Pension, Health and Welfare, Apprenticeship, NJATC Fund and dues check off to the International Brotherhood of Painters and Allied Trades Union and Industry Pension Annuity Fund, Suite 501 United Unions Building, 1750 New York Avenue, N.W., Washington, D.C., phone number (fiMDBUfi\*ERR17\*fiMDNMfi) 4880.

The above mentioned employee has full knowledge and understanding that Russo Painting and Dec, Inc., is no longer a Union Contractor as of August 31, 1991 after terminating their contract with Local 452.

Carl Monyhan

Jerome Russo, Non-Union Painting Contractor

Monyhan carried the papers to the union hall for advice, "They said the paper didn't mean nothing being he's in the Union." The next day Monyhan went back to Respondent Russo and signed the papers. Monyhan was never called for work. According to Jerome Russo he gave the first letter to applicants who were union members only and the second letter to all applicants. No employee refused to sign the letter.

Second: Jerome Russo's demand that employees sign documents tantamount to "yellow dog" contracts before they would be considered for employment was in violation of Section 8(fiMDBUfi\*ERR17\*fiMDNMfi) (fiMDBUfi\*ERR17\*fiMDNMfi) of the Act NLRB 887 (fiMDBUfi\*ERR17\*fiMDNMfi) 1991) (fiMDBUfi\*ERR17\*fiMDNMfi).

George L. James and Segundo Luciano

First: George L. James and Segundo Luciano were employees of Respondent Waite. They were journeymen painters and members of the Union.

Joy Waite prepared the following letter on August 30, 1991, for the signature of each employee:

September 3, 1991

Segundo Luciano

This letter is to state that the above mentioned employee as of August 31, 1991 is no longer working for a Painting Contractor that has a signed working agreement with International Brotherhood of Painters and Allied Trades Local Union 4512.

Waite Painting Corp. is no longer responsible for payment of Pension, Health and Welfare, Apprenticeship Fund, NJATC Fund and Dues Check Off to the International Brotherhood of Painters and Allied Trades

Union and Industry Pension and Annuity Fund, Suite 501, United Unions Building, 1750 New York Avenue, N.W., Washington, D.C., phone number (fiMDBUfi\*ERR17\*fiMDNMfi) 4880.

The above mentioned employee has full knowledge and understanding that Waite Painting Corp. is no longer a Union Contractor as of August 31, 1991 after terminating their contract with Local 452.

Segundo Luciano, Employee

John Waite, Non-Union Painting Contractor [G.C. Exh. 33.]

According to James, a couple of months before the contract was up, John Waite told him and Luciano that he was "going to go non-union and he would like for me to stay with him. He was going to give me a fifty cents raise, and a \$2,000.00 CD a year, and insurance." James responded that he would think about it. Later John Waite came to James on the jobsite and wanted him to "knock off" early "to try to get Jeff to sign a paper so we could go to work." The purpose of the paper was to "relieve Waite Painting Corporation from taking out any benefits, Union benefits." James went to the union hall. McGinty would not sign the paper John Waite wanted. McGinty wanted Waite to sign the contract. He told him to ask John Waite whether he was fired or laid off. James put the question to John Waite but did not receive an answer. John Waite said that he and Joy were going to "make a paper stating, you know, if we signed a paper than we could work on Tuesday." Luciano was present. On September 2, 1991, James went to the jobsite. Luciano had the "paper." The paper was the same as noted above. James "couldn't" sign the paper and left the jobsite and sought another job. A couple of days later James called John Waite and told him that he would not sign the paper; that he had another job.

According to Joy Waite, Luciano was given a copy of the letter set out above; he handed it back because he knew its contents. On August 30, 1991, he visited the Waites with his daughter, since he was unable to read English. He wanted to know what was going on between the union people and Waite. The contents of the letter was communicated to Luciano.

Luciano worked for Respondent Waite until September 10, 1991, at which time he called John Waite and told him he was going to work for Harold Clark and Maehlmann's.

Luciano had told Joy Waite that he did not want to lose his pension. He told John Waite, "I can't stay with you because you got no union no more." Luciano had been a union member for 21 years.

Second: By conditioning the employment of its employees Luciano and James on their working without union representation and under working conditions other than those specified by the collective-bargaining agreement applicable to them, and by James and Luciano having chosen to forgo their employment rather than accept those unlawful conditions, they were thereby constructively and unlawfully discharged. *Advance Electric*, 268 NLRB 1001 (fiMDBUfi\*ERR17\*fiMDNMfi) cases cited therein. By engaging in the misconduct described

above Respondent Waite violated Section 8(f)(1) of the Act.

#### Antoine Poma and John Babcock

First: Antoine Poma and John Babcock were employed as journeymen printers by Respondent Russo. They were members of the Union. Poma left Respondent Russo's employment on August 30, 1991. Two days before his termination Jerome Russo visited him at a jobsite and said to him "That he was gonna go non-union, and Friday would be my last day of work." The next morning Poma approached Jerome Russo and asked him if he could work until he found another job. Jerome Russo agreed but later returned and said, "His attorney advised him not to keep me, cause he would be in trouble with the Union, if he does." Poma then left employment, on Friday. Jerome Russo testified that, "he could either stay in my employment but I will not be paying him benefits the 31st, or your [sic] could choose to do whatever."

The last day Babcock worked for the Respondent Russo was August 30, 1991. During the first week of August, Jerome Russo told Babcock he was contemplating going non-union. Jerome Russo asked Babcock what he would do if he went nonunion. He answered that he would "probably stay with the Union." Jerome Russo said that he had not yet made up his mind. In the third week of August Jerome Russo advised Babcock that he was going nonunion.

Babcock responded that he was "probably leaving." Babcock further testified that when Jerome Russo complained about the Union he said, "I can't understand what he was complaining about, being that the employees hadn't received a raise in approximately five years."

On August 30, 1991, Jerome Russo advised Babcock that he would have to let him go; that "his lawyer advised him that it would be a conflict of interest to keep me working for him."

Second: The credible evidence establishes that Russo discharged Babcock and Poma because of their union connections and that they would have been continued in employment if they had been nonunion. Accordingly the discharges violated Section 8(f)(1) of the Act. 251 NLRB 1083 (1980).

#### CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(b) of the Act for jurisdiction to be exercised.

2. The Union is a labor organization within the meaning of Section 2(b) of the Act.

3. The following units constitute appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All employees of Respondent Russo who perform work which is described in and covered by the Working Agreement effective September 1, 1991 through August 31, 1992 between the Union and any person, firm or corporation performing work under the trade and geographical jurisdiction as set forth in this Working Agreement.

work which is described in and covered by the Working Agreement effective September 1, 1991 through August 31, 1992 between the Union and any person, firm or corporation performing work under the trade and geographical jurisdiction as set forth in this Working Agreement.

4. The Union has been at all times material the exclusive representative of the employees in the aforesaid appropriate units for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unlawfully failing and refusing to execute a written contract (Exh. 27) of the agreement reached with the Union, the Respondents engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

6. By unilaterally, and without notice to the Union, changing existing terms and conditions of employment as set forth in the agreement, the Respondents violated Section 8(a)(5) of the Act.

7. By withdrawing recognition from and refusing to recognize and bargain with the Union, the Respondent violated Section 8(a)(5) of the Act.

8. By refusing to hire Carl S. Monahan on or about September 8, 1991, and by causing the termination of Antoine Poma and John Babcock on August 3, 1991, Respondent Russo has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. By causing the termination of George L. James on August 31, 1991, and Segundo Luciano on September 10, 1991, Respondent Waite has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

10. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(a) of the Act.

#### REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having also found that the Respondent Russo unlawfully refused to hire Carl S. Monahan on or about September 8, 1991, and unlawfully caused the termination of employment of Antoine Poma and John Babcock on August 31, 1991, and that Respondent Waite unlawfully terminated the employment of George L. James on August 31, 1991, and Segundo Luciano on September 10, 1991, and has failed and refused to offer them employment in violation of the Act, it recommended the following remedies:

In accordance with Board policy it is recommended that the Respondents respectively offer Poma, Babcock, James, and Luciano immediate and full reinstatement to their former positions and that Respondent Russo offer Monahan the position he would have filled had he been lawfully hired or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any employees hired on or since the date of their discharges to fill the positions, and make them whole for any loss of earnings they may have suffered by reason of the Respond-



<sup>21</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(fiMDBUfi\*ERR17\*fiMDNMfla)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully changing terms and conditions of employment and dealing directly with its employees in regard to matters within the scope of collective bargaining.

(fiMDBUfi\*ERR17\*fiMDNMflb)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully advising employees that it will operate its establishment nonunion.

(fiMDBUfi\*ERR17\*fiMDNMflc)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMfld)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMfle)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees of Waite Painting Corporation who perform work which is described in and covered by the Working Agreement effective September 1, 1991 through August 31, 1992 between the Union and any person, firm, or corporation, performing work under the trade and geographical jurisdiction as set forth in this Working Agreement.

(fiMDBUfi\*ERR17\*fiMDNMflf)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMflg)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(fiMDBUfi\*ERR17\*fiMDNMflh)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMfli)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMflj)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMflk)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMflle)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMflm)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMfln)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMflo)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

(fiMDBUfi\*ERR17\*fiMDNMflp)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

<sup>22</sup> See fn. 21, supra.

## APPENDIX B

### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government  
Unlawfully discouraging membership in the Union, or

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

We (fiMDBUfi\*ERR17\*fiMDNMfla)fiMDBUfi\*ERR17\*fiMDNMfi Unlawfully refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

We WILL NOT change the terms and conditions of employment set forth in the agreement during the term of the agreement without the consent of the Union.

We WILL NOT unilaterally and without notice to the Union change terms and conditions of employment of our employees or deal directly with our employees about matters falling within the scope of collective bargaining.

We WILL NOT unlawfully withdraw recognition and refuse to bargain with the Union during the period that the aforesaid collective-bargaining agreement is binding on the parties.

We WILL NOT unlawfully discharge or discipline any of our employees or discriminate against them in any manner because of their union affection or union activities.

We WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We WILL forthwith sign the collective-bargaining agreement referred to above and recognize and bargain collectively with the Union during the term of the contract.

We WILL give retroactive effect to the provisions of the agreement and make whole our employees for any losses they may have suffered by reason of our failure to sign the agreement.

We WILL continue in effect any and all benefits of every kind and on request make available to the Board.

We WILL offer George L. James and Segundo Luciano immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent posi-

tions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make whole our unit employees by transmitting the contributions owed to the Union's health and welfare, pension, vacation and holiday, and apprenticeship and training funds pursuant to the terms of our collective-bargaining agreement with the Union, and by reimbursing unit employ-

ees for any medical, dental, or any other expenses ensuing from our unlawful failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare, pension, industry, and apprenticeship funds after we unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of our required contributions to such funds; and for any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered. (fiMDBUfl\*ERR17\*fiMDNMfiSee *Ad* *tr*ic, 268 NLRB 1001 (fiMDBUfl\*ERR17\*fiMDNMfi1984)fiMDBUfl\*ERR17\*fi

WAITE PAINTING CORPORATION